Supreme Court, U.S.
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No. 95-1897

In The

Supreme Court of the United States

October Term, 1995

ANTHONY MACALUSO,

Petitioner,

v.

DERRICK ANDERSON, dba
ANDERSON STUDIOS,

Respondent,

INDUSTRIAL COMMISSION OF ARIZONA, SPECIAL FUND DIVISION/NO INSURANCE SECTION,

Respondent Party in Interest.

Petition For A Writ Of Certiorari To The Arizona Supreme Court

OBJECTION TO WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

WHETHER THE SUPREME COURT OF ARIZONA'S WITHDRAWAL OF A STATE WRIT OF CERTIORARI INDICATING ONLY THAT THE REVIEW HAD BEEN IMPROVIDENTLY GRANTED ON A RECORD THAT FAILED TO RAISE ANY FEDERAL OR UNITED STATES CONSTITUTIONAL ISSUES UNTIL THE CASE WAS PETITIONED TO THE UNITED STATES SUPREME COURT, QUALIFIES FOR REVIEW UNDER 28 U.S.C. 1257(a)?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Anthony Macaluso, Derrick Anderson, dba Anderson Studios, Industrial Commission of Arizona, Special Fund Division/No Insurance Section.

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SUPPLEMENTAL STATEMENT OF THE CASE

The Respondent Party-in-Interest, the No Insurance Section of the Special Fund Division of the Industrial Commission of Arizona is an entity created by the Arizona Workers Compensation Act. A.R.S. §23-907(B) and A.R.S. §23-1065. The Special Fund administers and pays workers compensation claims where the employer is neither insured by approved workers compensation insurance nor is an authorized self-insurer under the Arizona Workers Compensation Act. A.R.S. §23-961. The Special Fund is funded from workers' compensation premium taxes imposed on all workers' compensation insurance carriers, including the State Compensation Fund and all self-insured employers. A.R.S. §23-961(G), A.R.S. §23-1065(A). The monies contained in the Special Fund are used for a variety of valuable and indispensable purposes. These purposes include, but are not limited to, supportive care claims, uninsured employer/employee claims and payment of vocational rehabilitation benefits.

Petitioner seeks constitutional review of Arizona statute A.R.S. §23-1023(C). This statute has been construed by the Arizona Supreme Court to forfeit an injured worker's rights to benefits under the Arizona Workers Compensation Act, *Hornback v. Industrial Commission of Arizona*, 106 Ariz. 216, 474 P.2d 807 (1970). Forfeiture is permitted when an injured worker settles a third-party claim without notice to the Special Fund or other qualified entity, and the third-party accident was the cause of the industrial injury for which the injured worker seeks compensation benefits. The Petitioner challenged the Arizona Supreme Court's longstanding forfeiture construction of A.R.S. §23-1023(C) on state law grounds only in

the Arizona Court of Appeals and the Arizona Supreme Court. Even in briefing before the Arizona Supreme Court, the Petitioner did not raise any federal issue or United States constitutional claim. Predicated on the state of the record, the Respondent Party-in-Interest submits this supplemental statement of the case going to the issue of jurisdiction to grant *certiorari*.

OBJECTIONS TO GRANTING WRIT OF CERTIORARI

I.

THE DECISION OF THE ARIZONA SUPREME COURT DID NOT INVOLVE A FEDERAL QUESTION OR FEDERAL CONSTITUTIONAL ISSUE.

Review of a state court decision is evoked under 28 U.S.C. §1257(a). Both the judgment and opinion of the state's highest court will be examined to determine whether review should be granted. *Gospel Army v. Los Angeles*, 331 U.S. 543, 548 (1947). The only dispositive order submitted from the Arizona Supreme Court is an order indicating the Arizona Supreme Court had "improvidently granted" review of an Arizona Court of Appeals decision. Petitioner's App. No. 1 Petition for Certiorari.

Pursuant to Supreme Court Rule 14(g)(i), it is incumbent upon the Petitioner to specify the stage of the state proceedings where the federal question or constitutional issue was raised. Sup. Ct. R. 14(g)(i). The materials appended to the Petition for a Writ of Certiorari reveal not a single instance that at any stage of the state proceedings a federal issue or constitutional question was

raised or ruled upon. Petitioner's App. Nos. 1-47, Respondent's App. Nos. R1-R4. Indeed, a review of the issues presented for review by the Petitioner to the Arizona Court of Appeals is equally bereft of any federal constitutional issue. App. R2, R4.

Arizona appellate law requires a party to raise issues at an intermediate appellate level before those issues may be raised in a subsequent appeal to the Arizona Supreme Court. *Gold v. Killeen*, 20 Ariz. 126, 69 P.2d 800 (1937), *Red Bluff Mines, Inc. v. Industrial Commission of Arizona*, 144 Ariz. 199, 696 P.2d 1348 (App. 1984). Issues not raised at the first level of appeal are deemed waived. *Carrillo v. State of Arizona*, 169 Ariz. 126, 132, 817 P.2d 493, 499 (App. Div. 1, 1991). Where state procedures govern the manner by which issues are raised, failure to comply with those state procedures is generally fatal to United States Supreme Court review. *Ferguson v. Georgia*, 365 U.S. 570, 572 n.1 (1961).

This Court has required a Petitioner to demonstrate that the federal or constitutional issues be "pressed" and "passed upon" by the state court. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 77-80 (1988); *TXO Production Corporation v. Alliance Resources Corporation*, 509 U.S. 443, 464 (1993). Unlike two Arizona cases which were granted *certiorari* where the federal issues were not arguably raised at the trial or appellate level, in this case the Arizona Supreme Court did not mention or reference any federal or United States constitutional law in its dispositive order. *Schad v. State of Arizona*, 501 U.S. 624, 630 n.2 (1991), *Asarco Inc. v. Kadish*, 490 U.S. 605, 625 (1989). Thus, the Petitioner has failed to establish that the federal or constitutional issues for which he seeks review

were "pressed" or "passed upon" by either the Arizona Supreme Court, the Arizona Court of Appeals or administrative law judge. *First English Lutheran Evangelical Church v. City of Los Angeles,* 482 U.S. 304, 313 n.8 (1987).

If the Petitioner were viewed as having "pressed" the federal issues, further inquiry is required to establish whether an independent and adequate reason grounded in state law supports the state decision. *Michigan v. Long,* 463 U.S. 1032 (1983), *State of Arizona v. Evans,* 115 S.Ct. 1185, 1189-90, 131 L.Ed.2d 34, 41-43 (1995). The issues presented to the Arizona Court of Appeals and the resulting intermediate appellate decision from which Petitioner sought review from the Arizona Supreme Court rested solely on Arizona state law. Petitioner's App. No. 15-19.

The Petitioner's Statement of Issues to the Arizona Court of Appeals read:

ISSUES PRESENTED FOR REVIEW

I. ARE THE AWARDS BELOW REASONABLY SUPPORTED BY THE LAW AND THE EVIDENCE WHEREIN THE PETITIONER WAS DENIED BENEFITS NOTWITHSTANDING A COMPENSABLE CLAIM BECAUSE HIS THIRD PARTY CLAIM WAS SETTLED FOR POLICY LIMITS WITHOUT THE APPROVAL OF THE UNINSURED EMPLOYER BEFORE THE CLAIM WAS HELD COMPENSABLE?

II. IS RESPONDENT UNINSURED EMPLOYER/NO INSURANCE FUND ENTITLED TO A LIEN IN THE AMOUNT OF THE THIRD PARTY RECOVERY WHERE PETITIONER HAS RECEIVED

NO WORKERS' COMPENSATION BENEFITS IN VIOLATION OF *A.R.S. 23-1023(C)*?

III. ARE THE AWARDS BELOW REASONABLY SUPPORTED BY THE LAW AND THE EVIDENCE WHEREIN THE DENIAL OF COMPENSATION TO THE PETITIONER REWARDS AND UNJUSTLY ENRICHES THE EMPLOYER WHO HAD ILLEGALLY FAILED TO PROVIDE WORKER'S COMPENSATION INSURANCE AS REQUIRED BY *THE ARIZONA CONSTITUTION*?

IV. DO THE AWARDS BELOW DENY PETITIONER WORKER'S COMPENSATION BENEFITS IN VIOLATION OF ARTICLE XVIII, SECTION VIII OF THE *ARIZONA CONSTITUTION*?

App. No. R4 (emphasis added).

When the Petitioner filed his Petition for Review to the Arizona Supreme Court, he failed to raise one federal or United States constitutional issue. App. No. R2. The issues presented to the Arizona Supreme Court by the Petitioner were as recited in his Petition for Review:

B. *ISSUE PRESENTED*

Are the awards reasonably supported by the law and the evidence wherein the Petitioner was denied benefits notwithstanding a compensable claim because his third-party claim was settled for policy limits without the approval of the Uninsured Employer before the claim was held compensable?

C. *ISSUES NOT DECIDED BY THE COURT OF APPEALS*

1. Should not benefits have been paid to Petitioner subject to a credit on behalf of the Special Fund to the extent of the Petitioner's new third-party recovery?

2. Are the awards reasonably supported by the law and the evidence wherein the denial of compensation to the Petitioner rewards and unjustly enriches the employer who had illegally failed to provide Workers' Compensation insurance as required by the law?

3. Do the awards deny Petitioner Worker's Compensation benefits in violation *Article XVIII, Section VIII of the Arizona Constitution*?

App. No. R2. Petitioner's briefing to the Arizona Court of Appeals did *not* make any reference to any federal or United States constitutional law. App. Nos. R2 & R4.

The decision by the Arizona Supreme Court not to review the intermediate appellate court decision reasonably stands on the Arizona law cited in the Arizona Court of Appeal's Opinion, said decision being totally adequate to dispose of the issues raised by the Petitioner to that appellate court. Petitioner's App. No. 15. This Court long ago wrote:

> It is well settled in this Court that it must be made to appear that some provision of the Federal as distinguished from the state Constitution was relied upon, and that such provision must be set forth.

New York Central & R.R. Company v. New York, 186 U.S. 269, 273 (1902). Absent any reference to federal or United

States constitutional provisions, a decision to reject review initially granted is a record devoid of a federal issue.

II.

CONCLUSION

The Respondent Party-in-Interest objects to the issuance of a Writ of Certiorari in this case where no federal or United States constitutional issue was either presented or ruled upon by the Arizona Supreme Court. The Respondent Party-in-Interest has not responded directly to the constitutional issues set forth in the Petition for Certiorari as it believes the threshold issue of establishing jurisdiction under 28 U.S.C. §1257(a) has not been met by the Petitioner.

Respectfully submitted,

Industrial Commission of Arizona

RONALD M. ANDERSEN
Attorney for Respondent
Party-in-Interest

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANTHONY MACALUSO, Petitioner Employee, v. DERRICK ANDERSON, dba, ANDERSON STUDIOS, Defendant Employer, INDUSTRIAL COMMISSION OF ARIZONA, SPECIAL FUND DIVISION/NO INSURANCE SECTION, Defendant Party In Interest.	No. 2CA-IC 94-0017 ICA NO.: 91336-027124 S.S. NO.: 336-48-7905 CARRIER NO.: UNASSIGNED D/ INJURY: 06/18/91 **PETITION FOR REVIEW**

APPELLANT, Anthony Macaluso, by and through his counsel, undersigned, hereby respectfully petitions the Supreme Court of Arizona, pursuant to Arizona Rule of Appellate Procedure 23, to review the Decision of the Court of Appeals in this matter entered on the 30th day of August, 1994.

A. SYNOPSIS OF COURT OF APPEALS DECISION

The Opinion Decision of the Court of Appeals, a copy of which is attached hereto and by this reference made a part hereof for all purposes as Appendix "A", affirmed

the Administrative Law Judge's (ALJ) Decision finding that Petitioner was not entitled to workers' compensation benefits under *Hornback v. Industrial Commission of Arizona*, 106 Ariz. 216, 474 P.2d 807 (1970) because he failed to obtain permission from his uninsured employer or the No Insurance Fund of the I.C.A. to settle his third party lawsuit for the policy limits prior to the time that his previously denied workers' compensation claim was accepted. The Court of Appeals rejected Petitioner's argument that the No Insurance Fund did not acquire a lien under A.R.S. § 23-1023(C) until it paid compensation or medical benefits. The Court of Appeals stated:

"This argument overlooks the fact that once Macaluso filed a claim for workers' compensation benefits that claim came under the jurisdiction of the Industrial Commission and he was bound by the provisions of the Workers' Compensation Act as well as the Rules of Procedure for Hearings before the Industrial Commission . . . "

The Court of Appeals affirmed the ALJ's Decision as follows:

> "Because Macaluso violated the provisions of § 23-1023(C), we are bound by the decision in *Hornback* to affirm the award of December 29, 1993, by which he is barred from receiving workers' compensation benefits. His invitation to overturn the ruling in *Hornback* is best addressed to the supreme court.
>
> Finally, as to the issue of the extent of the No Insurance Section's lien, we agree with Macaluso that because § 23-1023(C) provides that the lien is on the amount "of such compensation

and medical, surgical, and hospital benefits paid" and because no benefits have been paid, any lien it has is on nothing. See *EBI Companies v. Industrial Commission of Arizona*, ___ Ariz. ___, 875 P.2d 857 (App. 1994).

B. ISSUE PRESENTED

Are the awards reasonably supported by the law and the evidence wherein the Petitioner was denied benefits notwithstanding a compensable claim because his third party claim was settled for policy limits without the approval of the Uninsured Employer before the claim was held compensable?

C. ISSUES NOT DECIDED BY THE COURT OF APPEALS

1. Should not benefits have been paid to Petitioner subject to a credit on behalf of the Special Fund to the extent of the Petitioner's net third-party recovery?

2. Are the awards reasonably supported by the law and the evidence wherein the denial of compensation to the Petitioner rewards and unjustly enriches the employer who had illegally failed to provide Workers' Compensation Insurance as required by the law?

3. Do the awards deny Petitioner Workers' Compensation benefits in violation of *Article XVIII, Section VIII of the Arizona Constitution?*

* * *

IN THE COURT OF APPEALS
STATE OF ARIZONA
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ANTHONY MACALUSO, Petitioner, v. DERRICK ANDERSON, dba, ANDERSON STUDIOS, Defendant Employer, INDUSTRIAL COMMISSION OF ARIZONA, SPECIAL FUND DIVISION/NO INSURANCE SECTION, Defendant Party In Interest.	No. 2CA-IC 94-0017 ICA NO.: 91336-027124 S.S. NO.: 336-48-7905 CARRIER NO.: UNASSIGNED D/ INJURY:06/18/91

PETITIONER'S OPENING BRIEF

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* * *

ISSUES PRESENTED FOR REVIEW

I. ARE THE AWARDS BELOW REASONABLY SUPPORTED BY THE LAW AND THE EVIDENCE

WHEREIN THE PETITIONER WAS DENIED BENEFITS NOTWITHSTANDING A COMPENSABLE CLAIM BECAUSE HIS THIRD PARTY CLAIM WAS SETTLED FOR POLICY LIMITS WITHOUT THE APPROVAL OF THE UNINSURED EMPLOYER BEFORE THE CLAIM WAS HELD COMPENSABLE?

II. IS RESPONDENT UNINSURED EMPLOYER/NO INSURANCE FUND ENTITLED TO A LIEN IN THE AMOUNT OF THE THIRD PARTY RECOVERY WHERE PETITIONER HAS RECEIVED NO WORKERS' COMPENSATION BENEFITS IN VIOLATION OF A.R.S. § 23-1023(C)?

III. ARE THE AWARDS BELOW REASONABLY SUPPORTED BY THE LAW AND THE EVIDENCE WHEREIN THE DENIAL OF COMPENSATION TO THE PETITIONER REWARDS AND UNJUSTLY ENRICHES THE EMPLOYER WHO HAD ILLEGALLY FAILED TO PROVIDE WORKER'S COMPENSATION INSURANCE AS REQUIRED BY THE ARIZONA CONSTITUTION?

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